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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. EDGAR ALVAREZ, Defendant and Appellant.	B203886 (Los Angeles County Super. Ct. No. BA279503)

APPEAL from a judgment of the Superior Court of Los Angeles County, Sam Ohta, Craig E. Veals, Judges. Affirmed.

Brett Harding Duxbury, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Jason Tran and Robert C. Schneider, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Appellant, Edgar Alvarez, appeals from his conviction for first degree murder. He contends that the trial court's admission of a witness's prior testimony was error and resulted in a denial of his constitutional right to confront the witness. Appellant also contends that the court erred in failing to excise the "certainty factor" from the jury instruction based upon CALCRIM No. 315, which provides guidance in evaluating eyewitness testimony.[1] We conclude the trial court did not err, and affirm the judgment.

BACKGROUND

1. *Pretrial Procedure*

Appellant was charged with the first degree murder of Enrique Chavez. It was specially alleged that appellant personally and intentionally discharged a handgun, causing great bodily injury and death to the victim within the meaning of Penal Code section 12022.53, subdivision (d).[2] It was also alleged that appellant personally and intentionally discharged a handgun, within the meaning of Penal Code section 12022.53, subdivisions (b) and (c).[3] Finally, the information alleged that appellant committed the offense for the benefit of, at the direction of, and in association with a criminal street gang, with the specific intent to promote, further,

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[1] That factor, one of 14 listed to assist the jury in evaluating eyewitness testimony, asks the jury to consider "[h]ow certain was the witness when he or she made an identification?" (CALCRIM No. 315.)

[2] Penal Code section 12022.53, subdivision (d), requires a prison sentence of 25 years to life when the allegations are found true.

[3] A true finding under Penal Code section 12022.53, subdivision (b) adds a consecutive term of 10 years, and a true finding under subdivision (c) adds a consecutive term of 20 years.

or assist in any criminal conduct by gang members, pursuant to Penal Code section 186.22, subdivision (b)(1)(A) and (4).[4]

Appellant's case first went to jury trial in February and March 2006. The jury deadlocked and a mistrial was declared March 13, 2006. Appellant's second trial in December 2006 also ended in a mistrial. His third jury trial, which resulted in a conviction, took place in July 2007.

2. *Hearing re Unavailability of Witness*

At trial, the prosecution requested an Evidence Code section 402 hearing regarding its efforts to locate witness Alejandro Razo.[5] Salvador Nares, an investigator for the Los Angeles County District Attorney, and Juan Gutierrez, the Los Angeles Police Department's investigating officer, testified for the prosecution.

Nares testified that although Razo was nervous about going to court, he was cooperative at all times throughout the first and second trials. It had taken Nares two weeks to find Razo prior to the December 2006 trial, but Razo contacted Nares at the time of the trial, and Nares drove Razo to court and took him home after his testimony.

Nares testified that Razo lived in the rear of a house located on Saint Louis Street, near the shooting relevant to this case, until December 2006, when he moved to a location at Fraser Avenue and Olympic Boulevard, where he rented a room. Razo did not have a telephone, but kept in touch by telephoning Nares

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[4] A true gang finding provides for an indeterminate life term, calculated pursuant to one of several enumerated methods. (See Pen. Code, § 186.22, subd. (b)(4).

[5] An Evidence Code section 402 hearing is the procedure by which the court may hear foundational evidence outside the presence of the jury. (See Evid. Code, §§ 400-406.)

every two weeks from a public telephone in a nearby Laundromat. Razo continued to call after the December trial, until March 2007.

Beginning in March, Nares visited the Fraser and Olympic location every week, attempting to contact Razo and his neighbors, leaving a card at the door when there was no answer. In April 2007, three weeks after Razo had stopped calling, Nares observed a "For Sale" sign posted on the property. There was a telephone number, but no address on the sign. Nares telephoned the real estate office a number of times, and reached recorded messages. He left messages, identifying himself, but received no return calls. Finally, in early July, a person answered, and agreed to relay a message to the owner of the house, who later informed Nares that Razo had moved out, and he gave Nares the work address of one of his former tenants. Nares went to the location and spoke to the former tenant, who told him that Razo had moved out of state.

In mid-May 2007, Nares went to the Laundromat, where he spoke to the manager, Maria, and showed her photographs of Razo. She confirmed that Razo did his laundry there on Saturdays. Nares visited the Laundromat numerous times in his effort to locate Razo.

In June 2007, Nares returned to the neighborhood of the shooting, and distributed handmade posters bearing Razo's photograph and the contact information for himself and Officer Gutierrez. Later in June, Nares placed photographs on cars in the neighborhood. Nares also contacted the other tenants at Razo's former residence, and inquired of them. He spoke to several of them who knew of Razo, but had not seen him in many weeks.

Razo had no relatives living in the state, but he had told Nares he could be reached through his employer, who also resided at 310 Saint Louis Street. When Nares lost touch with Razo, he was able to contact the wife of Razo's former employer, and left a card with her, but the employer never called.

Also in June, Nares checked with the United States Immigration and Customs Enforcement agency, although he believed Razo was in the country legally because he had a driver's license. Nares also checked area hospitals and the coroner's office, and searched law enforcement databases for several counties to see if Razo was in custody or had outstanding warrants. In July, Nares rechecked the agencies previously contacted.

Investigating Officer Juan Gutierrez testified that he used the police department database to search for Razo in different law enforcement systems. He also used "Auto Track," a national search system connecting hundreds of databases throughout the country, designed to find people. Beginning in May 2007, he checked the same databases three additional times.

In late May, Gutierrez went to Razo's former residence on Saint Louis Street, and spoke to a woman named Maria, who told him that she knew Razo, but had not seen him, and had heard that he was on vacation in Mexico. Maria told Gutierrez that a relative or family friend by the name of Guera lived in the area. Gutierrez gave her several of his cards, and telephoned Maria several times afterward to ask whether she had seen Guera, but Maria said that she had not.

Gutierrez located a friend of Razo, Maricela Navarette, who had been a neighbor in the area of Saint Louis Street. She told him that Razo had left the area after telling her that he was thinking about moving to New Orleans, but he continued to telephone her periodically until a month and a half before she spoke to Gutierrez.

Gutierrez testified that on two Saturdays in July, he went to the Laundromat from which Razo had telephoned him before he lost contact approximately three months earlier. Gutierrez waited at the Laundromat for approximately an hour each time, but did not see Razo.

The trial court found that the evidence sufficiently established due diligence on the part of the prosecution, and ruled that Razo's former testimony from the December 2006 trial would be admitted on the ground that he was unavailable as a witness.

3. *Trial Testimony*

Los Angeles Police Officer Raul Soto and his partner, Officer Juan Silva, were on patrol at approximately 8:20 p.m., on February 27, 2005, when they heard gunshots coming from south of the intersection of Saint Louis Street and Michigan Avenue. They were driving in the direction of the shots, when Soto saw a hooded person in dark clothing, sprinting across the intersection. Seconds later, they saw two muzzle flashes. As soon as Soto stopped his vehicle, the officers observed a male juvenile lying on the ground, with several gunshot wounds. The officers then saw a male Hispanic, later identified as appellant, dressed in a gray shirt and denim shorts, standing in the front yard of a house on the corner. Appellant was ordered to the ground and handcuffed.

Once appellant was taken into custody, other officers arrived. When Officer Karen Stanwix arrived, she heard someone whisper in Spanish, "*Official, official*," and observed a man in the yard where appellant had been taken into custody. (Italics added.) The man waved his arms as if to gain her attention, and then pointed to the ground, where Officer Stanwix observed a blue steel handgun. Stanwix did not speak Spanish, so she called Officer Silva over to translate.

Silva testified that he found Stanwix with an agitated, frightened-looking man in his late 20's or early 30's, who identified himself as Mr. Razo. Razo pointed to a blue steel firearm in the grass, and then pointed to appellant. Silva recognized the weapon as a semiautomatic handgun, and observed a magazine and round next to the gun. Razo seemed excited and nervous, speaking rapidly in Spanish and moving his hands around. He told Silva that he had seen appellant

toss the gun, and that appellant had told him to hide the gun and not say anything. Razo pointed at appellant, who was in custody approximately 20 to 25 feet away, and said that the person he saw was the one wearing blue denim shorts.

Carolyn Limon, a resident of the neighborhood, was outside her home talking to friends that evening when she noticed a group of five or six young men walking toward Saint Louis Street. Later, Limon was shown four individuals in separate showups, and identified appellant and two others as men she had seen that evening. When shown appellant for approximately 30 seconds, Limon was at first unable to identify him, but after she asked the officers to turn off their spotlight and appellant turned sideways, she recognized him. As soon as appellant walked away, she said, "That's him. That's him. I recognize him now. I recognize him by the gray shirt he was wearing and the blue shorts. That was the guy that the police took into custody." At trial, Limon testified regarding her observations, and identified appellant in court as the man who wore light blue denim shorts and a gray shirt. She testified that the other men she saw that night wore dark hooded sweatshirts with the hoods up.

Limon testified that as the men walked toward Saint Louis Street that evening, she heard a shot, and then saw appellant on the corner of Saint Louis and Michigan Avenue, shooting a gun. She continued to observe appellant as she called 911. She saw him walk into the street, firing the gun at another person who was screaming, "No," as he lay in the street. Appellant was very close to the victim -- "right on top of him" -- as he fired. The police arrived very quickly and took him into custody. Limon testified that she was 100 percent certain that the shooter was appellant and the same person taken into custody.

The prosecution read to the jury Razo's testimony from appellant's December 2006 trial. Razo testified that the shooting of February 27, 2005, took place outside his house on Saint Louis Street at Michigan Avenue. Sometime after

8:00 p.m., while in his yard, Razo heard gunshots and then moaning. He looked toward the corner and observed a person lying in the street and a man standing near him, shooting him. After shooting the victim, the man walked quickly to the sidewalk next to Razo's house, leaned on the cement block wall and fired his gun toward the intersection. The man then threw the gun into Razo's yard, took off his gloves, letting them drop into some weeds, and said to Razo in Spanish, "'"Hide it, hide it, hide it. Don't say anything."'" At that moment, the police arrived, pointed their guns at the man and at Razo, and then handcuffed the man. Razo estimated that approximately 30 seconds elapsed from the time he first saw the man until the police handcuffed him.

Razo testified that the shooter wore denim shorts and a short-sleeved, dark-colored shirt, and he identified appellant in court as the shooter. He confirmed that he told the police that appellant was the shooter. Razo also saw another young man who appeared to be a gang member.

Los Angeles Police Officer Larry Oliande testified as the prosecution's gang expert. Appellant is an admitted member of the Tiny Boys Gang, one of the criminal street gangs operating in the community that includes the scene of the shooting. Oliande expressed his opinion that the shooting was done for the benefit of the gang.

Appellant's friend Marcos Martinez testified that he was not a gang member, but knew that appellant was. He testified that he had spent the day of the shooting with appellant, and that they were on Saint Louis Street near Michigan Avenue when a van abruptly stopped nearby. A passenger alighted and shot a person who had been with a group of men in the vicinity. Marcos panicked and ran away, while appellant hopped over a cinder block wall on the corner.

The victim's friend, Francisco Gonzalez, testified that he and the victim were members of the State Street Locos Gang, rivals of the Tiny Boys. He and the

victim went into Tiny Boys territory the evening of the shooting to spray paint graffiti. Gonzalez testified that they stopped to talk to an acquaintance on Michigan Avenue near Saint Louis Street, when a minivan pulled up, and an occupant wearing a dark "hoodie" asked what gang they were from. They said nothing, but both young men wore clothing with "State Street" written on it. Gonzalez heard the sound of doors opening, followed by gunshots, and he ran away. He testified that he did not see appellant there that evening.

Appellant's hands were tested for gunshot residue, but none was found. His clothing was not tested; it was not police department policy to do so. No prints were found on the gun, magazine, or casings recovered at the scene. The police department firearms expert tested the gun and found that the bullets recovered from the coroner were consistent with having been fired from the weapon, but he could not positively confirm or rule out that the gun had fired the fatal shots.

4. *Judgment and Appeal*

On July 27, 2007, the jury found appellant guilty of murder, and found true the firearm and gang allegations under section 12022.53, subdivision (d), and 186.22, subdivision (b)(1). The court denied appellant's motion for new trial October 31, 2007, and sentenced him to two consecutive 25-years-to-life terms in prison. On November 9, 2007, appellant timely filed a notice of appeal from the judgment.

DISCUSSION

1. *Contentions*

Appellant makes two assignments of error. First, he contends that the trial court erred in admitting the prior testimony of Alejandro Razo, who had testified during appellant's December 2006 trial. Appellant argues that the trial court erred in finding that the prosecution exercised reasonable diligence searching for Razo, and that Razo's unavailability was therefore not established.

Second, appellant contends that the court erred in reading a portion of CALCRIM No. 315, which instructs the jury to consider, as a factor in evaluating eyewitness testimony, how certain the witness was when he or she made the identification. Appellant argues that including the certainty factor deprived him of due process.

2. *Former Testimony*

"Evidence of former testimony is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness and . . . [¶] . . . [¶] [t]he party against whom the former testimony is offered was a party to the action or proceeding in which the testimony was given and had the right and opportunity to cross-examine the declarant with an interest and motive similar to that which he has at the hearing." (Evid. Code, § 1291, subd. (a).)[6] "When the requirements of Evidence Code section 1291 are met, 'admitting former testimony in evidence does not violate a defendant's right of confrontation under the federal Constitution. [Citations.]' [Citation.]" (*People v. Wilson* (2005) 36 Cal.4th 309, 340.)

As relevant here, "'unavailable as a witness' means that the declarant is . . . [¶] . . . [¶] . . . [a]bsent from the hearing and the court is unable to compel his or her attendance by its process," or "[a]bsent from the hearing and the proponent of his or her statement has exercised reasonable diligence but has been unable to procure his or her attendance by the court's process." (Evid. Code, § 240, subd. (a).) Because the "the relevant facts are undisputed, we review this determination independently. [Citation.] . . . The term 'due diligence' '"connotes persevering application, untiring efforts in good earnest, efforts of a substantial

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[6] Although appellant claims the prior testimony was given at his preliminary hearing, it was, in fact, given at the December 2006 trial. Appellant does not contend that he was given no opportunity to cross-examine Razo either at the preliminary hearing or at the previous trial.

character."' [Citation.] 'Relevant considerations include "'whether the search was timely begun'" [citation], the importance of the witness's testimony [citation], and whether leads were competently explored [citation].' [Citation.]" (*People v. Valencia* (2008) 43 Cal.4th 268, 292, quoting *People v. Cromer* (2001) 24 Cal.4th 889, 901, 904.)

"'What constitutes due diligence to secure the presence of a witness depends upon the facts of the individual case. [Citation.] The term is incapable of a mechanical definition. . . . The totality of efforts of the proponent to achieve presence of the witness must be considered by the court. Prior decisions have taken into consideration not only the character of the proponent's affirmative efforts but such matters as whether he reasonably believed prior to trial that the witness would appear willingly . . . .' [Citation.]" (*People v. Sanders* (1995) 11 Cal.4th 475, 523.)

Appellant argues that "the prosecution's 'efforts' were entirely passive, relying wholly on Razo's graciousness to call . . . ." We disagree, and as we have already summarized the substantial, active efforts, timely begun in earnest several months before trial by Nares and Gutierrez, we need not repeat them here.

Further, of all the efforts taken by the prosecution, appellant takes issue only with the failure to have a "backup plan" should Razo stop calling Nares and Gutierrez. Appellant notes that this was a gang case, and Razo moved from the neighborhood of the shooting because he was nervous about testifying. Appellant also notes that it had taken Nares two weeks to find Razo before the December trial, he had no relatives in town, his immigration status was uncertain, and there was no evidence that his employment was steady. Thus, appellant argues, the prosecution should have obtained alternate contact information while Razo was still in touch, such as relatives living abroad, or friends living locally. In fact, Gutierrez located Razo's friend, Maricela Navarette, and spoke to her. He also

spoke to a former neighbor and to the wife of Razo's employer, all to no avail. If, as appellant suggests, Razo did not want to be found, having the telephone numbers of these people in advance would not have helped.

"The prosecution is not required 'to keep "periodic tabs" on every material witness in a criminal case. . . .' [Citation.] Also, the prosecution is not required, absent knowledge of a 'substantial risk that this important witness would flee,' to 'take adequate preventative measures' to stop the witness from disappearing. [Citations.]" (*People v. Wilson*, *supra*, 36 Cal.4th at p. 342.) Substantial evidence supports the court's finding that Nares and Gutierrez reasonably believed, prior to trial, that Razo would appear willingly. (*People v. Sanders*, *supra*, 11 Cal.4th at p. 523.) Both Nares and Gutierrez testified they had no reason to believe that Razo would fail to keep in touch. Razo had willingly testified before and had kept in touch regularly until March 2007. As Razo had been cooperative and did not appear to be deceptive, neither Nares nor Gutierrez had reason to believe they needed to take additional measures to control his whereabouts. We accept the trial court's resolution of the witnesses' credibility. (*People v. Cromer*, *supra*, 24 Cal.4th at p. 902.)

The totality of the efforts by Nares and Gutierrez established that they competently explored leads, and that their efforts were timely, in good earnest, and of a substantial character. (*People v. Valencia*, *supra*, 43 Cal.4th at p. 292.) Thus, the prosecution established that it exercised due diligence to locate the witness, and the trial court did not err in admitting Razo's prior testimony.

3. *Evaluating Eyewitness Testimony*

Appellant contends that the court erred in reading CALCRIM No. 315, which instructs the jury to consider, as one of many factors in deciding whether an

eyewitness gave truthful and accurate testimony, how certain the witness was when he or she made the identification.[7]

The California Supreme Court has held that the relevant factors to be considered in determining whether identification evidence is reliable are those identified by the United States Supreme Court in *Neil v. Biggers* (1972) 409 U.S.

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[7] In its entirety, CALCRIM No. 315 reads:
"You have heard eyewitness testimony identifying the defendant. As with any other witness, you must decide whether an eyewitness gave truthful and accurate testimony. [¶] In evaluating identification testimony, consider the following questions:
"• Did the witness know or have contact with the defendant before the event?
"• How well could the witness see the perpetrator?
"• What were the circumstances affecting the witness's ability to observe, such as lighting, weather conditions, obstructions, distance, [and] duration of observation[, and _____<insert any other relevant circumstances>]?
"• How closely was the witness paying attention?
"• Was the witness under stress when he or she made the observation?
"• Did the witness give a description and how does that description compare to the defendant?
"• How much time passed between the event and the time when the witness identified the defendant?
"• Was the witness asked to pick the perpetrator out of a group?
"• Did the witness ever fail to identify the defendant?
"• Did the witness ever change his or her mind about the identification?
"• How certain was the witness when he or she made an identification?
"• Are the witness and the defendant of different races?
"• [Was the witness able to identify other participants in the crime?]
"• [Was the witness able to identify the defendant in a photographic or physical lineup?]
"• [_____<insert other relevant factors raised by the evidence>.]
"• Were there any other circumstances affecting the witness's ability to make an accurate identification?
"The People have the burden of proving beyond a reasonable doubt that it was the defendant who committed the crime. If the People have not met this burden, you must find the defendant not guilty."

188. (*People v. Kennedy* (2005) 36 Cal.4th 595, 610; *People v. Arias* (1996) 13 Cal.4th 92, 168.) In *Neil v. Biggers*, the high court noted: "As indicated by our cases, the factors to be considered in evaluating the likelihood of misidentification include the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, *the level of certainty demonstrated by the witness at the confrontation*, and the length of time between the crime and the confrontation." (*Neil v. Biggers*, *supra*, 409 U.S. at pp. 199-200, italics added.)

The certainty factor also appeared in CALCRIM No. 315's predecessor, CALJIC No. 2.92. The California Supreme Court has consistently rejected challenges to CALJIC No. 2.92. (See *People v. Ward* (2005) 36 Cal.4th 186, 213; *People v. Johnson* (1992) 3 Cal.4th 1183, 1230-1231; *People v. Wright* (1988) 45 Cal.3d 1126, 1143-1144.)

Acknowledging the factors enumerated in *Neil v. Biggers*, but disregarding the California decisions, appellant relies on several sister-state opinions citing scientific studies questioning the accuracy of eyewitness identification evidence, and in particular, "the assumption that the confidence with which one makes an identification directly correlates with its accuracy." (See, e.g., *Brodes v. State* (Ga. 2005) 614 S.E.2d 766; *Commonwealth v. Santoli* (Mass. 1997) 680 N.E.2d 1116; *State v. Ramirez* (Utah 1991) 817 P.2d 774.) Sister-state decisions may be persuasive, but they are not binding. (*Gutierrez v. Superior Court* (1994) 24 Cal.App.4th 153, 170.)

There is no shortage of California authority. The California Supreme Court rejected an argument similar to appellant's in *People v. Johnson*, *supra*, 3 Cal.4th at pages 1231-1232. There, the defendant challenged the certainty factor, because his eyewitness identification expert "testified without contradiction that a witness's confidence in an identification does not positively correlate with its accuracy." (*Id.*

at p. 1231.) The court held that the certainty factor of CALJIC No. 2.92 was neutral and did not instruct the jury to accept or reject the expert's testimony; the jury was free to reject it, even if uncontradicted. (*Id*. at pp. 1231-1232.) In addition, a California Court of Appeal has directly rejected the argument that the certainty factor was erroneous in light of the views of certain experts in eyewitness identification. (*People v. Gaglione* (1994) 26 Cal.App.4th 1291, 1302-1303, disapproved on another point in *People v. Martinez* (1995) 11 Cal.4th 434, 452.) The court found the factor to be neutral, because it did not endorse or reject one scientific study or another. (*People v. Gaglione*, at p. 1303.) More recently, the same court again rejected a similar challenge to the certainty factor of CALJIC No. 2.92. (*People v. Sullivan* (2007) 151 Cal.App.4th 524, 562.) We conclude from these authorities that the trial court did not err in including the certainty factor in its reading of CALCRIM No. 315.

Here, moreover, appellant submitted no expert testimony, and did not object to the instruction or suggest a modification. The trial court must give the instruction when requested in cases "in which identification is a crucial issue and there is no substantial corroborative evidence. [Citation.]" (*People v. Wright*, *supra*, 45 Cal.3d at p. 1144 [CALJIC No. 2.92].) However, the court should consider reasonable modification of the instruction, if requested. (*Id*. at p. 1143.) The court has no sua sponte duty to modify the instruction. (*People v. Sullivan*, *supra*, 151 Cal.App.4th at p. 561 [CALJIC No. 2.92]; *People v. Martinez* (1987) 191 Cal.App.3d 1372, 1384 [same].) Failure to object to an instruction forfeits the objection on appeal unless the instruction was erroneous or affected the defendant's substantial rights. (*People v. Mitchell* (2008) 164 Cal.App.4th 442, 465; Pen. Code, § 1259.)

Appellant contends that he has not forfeited his challenge to the certainty factor, arguing that his failure to object was excused because it would have been

futile, as the court would most certainly have overruled it. Appellant also argues that the instruction was an incorrect statement of the law. ~(AOB 27-28)~ We disagree. We have already concluded the instruction was correct, and thus, an order overruling an objection to it would not have affected appellant's substantial rights.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

MANELLA, J.

We concur:

EPSTEIN, P. J.

SUZUKAWA, J.